THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PETER SALTZ,	)	
Plaintiff,	)	
	)	
v.	)	
	)	C.A. No.: 09C-11-018 FSS
BRANTLEY MANAGEMENT	)	**(E-FILED)**
COMPANY, and ROBERT P. PINKAS	)	
Defendants.	)	

Submitted: February 1, 2011
Decided: May 31, 2011

Upon Defendant Robert Pinkas's Renewed Motion to Dismiss – DENIED;
Upon Defendant Robert Pinkas's Motion for Summary Judgment – GRANTED;
Upon Plaintiff Peter Saltz's and Brantley Management Company's Cross-Motions for Summary Judgment – GRANTED.

This is a breach of contract action on a $1 million promissory note governed by Ohio law. Defendant Robert Pinkas, an Ohio resident, signed the note as the Managing Member of Brantley Capital, one of several companies Pinkas has formed in Delaware since 1987. At Pinkas's request, Plaintiff Peter Saltz amended the note to change the borrower to Defendant Brantley Management, another of Pinkas's Delaware companies, and one he owned 100%. Defendants performed under the amended note for three years. When the amended note matured, Defendants defaulted. Then they tried to renegotiate its terms, but failed.

Now, Saltz sues Brantley Management for breach of contract and Pinkas for breach of contract, unjust enrichment, and conversion. Pinkas renews his motion to dismiss for lack of personal jurisdiction, and he moves for summary judgment. Brantley Management and Saltz cross-move for summary judgment on the amended note's enforceability. For the reasons set out below, Pinkas's decades long business of forming businesses in Delaware confers general personal jurisdiction. The amended promissory note is enforceable against Brantley Management but not Pinkas. Pinkas is also entitled to judgment on the remaining claims.

I.

Saltz characterizes Defendant Robert Pinkas, an Ohio resident and businessman, as a "serial incorporator." Rather than depose Pinkas, Saltz uses information from filings Pinkas made in a pending case in Chancery. Since 1987, Pinkas has formed 22 companies in Delaware. Two of those, Brantley Management Company and Brantley Capital Management, managed private equity investment funds. Typically, Pinkas would form a limited partnership to pool investors' money. Then, Pinkas would form another limited partnership to serve as the first entity's general partner and investment manager, which generated fees assigned to Brantley Management. A third Delaware entity, Pinkas Family Partners L.P., served as the second entity's general partner either alone or with others. Pinkas has created several

of these investment funds, and he has made several payments to Delaware's Secretary of State and the CT Trust Corporation to create these entities and to keep them alive.

Saltz's claims against Pinkas arise from an alleged offer Pinkas made in early 2004, and alleged personal benefits Pinkas derived from a subsequent $1 million loan. Pinkas told Saltz about a plan to invest in business loans. Saltz said he was more interested in an investment paying interest on a quarterly basis at ten percent, per year. Pinkas allegedly said, "I can do that." That comment, standing alone, forms the entire basis for Saltz's claim that Pinkas is personally liable.

According to Saltz, in September 2004, he wired $1 million at Pinkas's instruction to Brantley Mezzanine Finance, another of Pinkas's Delaware companies. In return, a promissory note was issued from Brantley Capital. Pinkas told Saltz that Brantley Capital could pay the interest. Under the note, the borrower promised to pay quarterly interest payments at ten percent, per year for five years. When the note matured, the borrower promised to make a final interest payment and repay the $1 million principal. The note recited it was "FOR VALUE RECEIVED," and it required that modifications be in a signed writing.

Pinkas used $550,000 of the loan as part of his $1,045,000 investment in Brantley Mezzanine. In 2006, Brantley Mezzanine went bust, taking its owners' equity along. None of those owners paid taxes on their allocation of Saltz's loan, nor

did they own any entity making payments under the note. Thus, according to Pinkas, he "had to be allocated the entire proceeds of the Saltz loan for tax purposes."

Saltz's breach of contract claim against Brantley Management arises from an amendment to the promissory note. In July 2006, Pinkas asked Saltz if he would change the borrower to Brantley Management. Brantley Management's CFO explained to Saltz that the amendment would reflect reality, as Brantley Management had been paying the interest for some time. Defendants drafted the amendment and Saltz signed it. Pinkas signed it as CEO of Brantley Management, the company, which, as mentioned, he owned 100%. The amendment made clear "[a]ll other terms and conditions of the original 9/17/04 promissory note shall remain unchanged." So, for at least three years, Brantley Management paid interest under the note. As mentioned, when the note matured in September 2009, Brantley Management defaulted. It tried to renegotiate the note, but failed.

For reasons unexplained, Saltz sued in Delaware instead of Ohio, whose law governs and where almost all the action took place. Saltz alleges Brantley Management breached the contract and, in addition, Pinkas has to answer because Brantley Management is merely his "alter ego." Saltz also alleges Pinkas breached an oral contract or was unjustly enriched by the loan, and that he converted the $1 million he loaned Brantley Mezzanine.

II.

A. Pinkas's Motions

Not surprisingly, Pinkas renews his motion to dismiss for personal jurisdiction. He contends "Saltz has not developed any factual record that can support a finding of general jurisdiction over Mr. Pinkas[,]" under 10 *Del. C.* § 3104(c)(4).[1] That is so because "there are no facts in the record supporting a finding that Mr. Pinkas was or is a 'serial incorporator.'" Besides, the decision to incorporate in Delaware was made by others.

Pinkas contends the court does not have specific personal jurisdiction over him either. First, no written or oral guaranty exists for purposes of 10 *Del. C.* § 3104(c)(6). Second, under 10 *Del. C.* § 3104(c)(1), the claims against Pinkas "are wholly unrelated to the formation of BMC or BCM (each of which were formed years

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[1] In pertinent part, 10 *Del. C.* § 3104(c) provides:

> As to a cause of action brought by any person arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent:
> (1) Transacts any business or performs any character of work or service in the State;
> . . .
> (4) Causes tortious injury in the State or outside the State by an act or omission outside the State if the person regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue form services, or things used or consumed in the State;
> . . .
> (6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

before the Note was amended)." Pointing to the imbalance between his Ohio and Delaware contacts, Pinkas contends it would be unconstitutional for the court to assert personal jurisdiction.

Pinkas also moves for summary judgment. He argues he cannot be held responsible for Brantley Management's alleged breach under an alter ego theory because Saltz has failed to set out any facts on that. Next, he argues no guaranty exists, but if it did the statute of frauds blocks the claim. He argues he was not unjustly enriched under Ohio law because the tax deduction was an indirect benefit. Finally, he argues a debtor cannot convert a debt under Ohio law.

B. Brantley Management's and Saltz's Cross-Motion

Brantley Management and Saltz cross-move for summary judgment on the amended note's enforceability. Saltz contends that under Ohio's antecedent debt exception, the amended note is enforceable against Brantley Management because it was a negotiable instrument that was issued for Brantley Capital's debt. Saltz further contends the amended note is supported by consideration because he forbore from suing Brantley Capital. Finally, Saltz argues the lack of Brantley Capital's signature on the amendment is immaterial because that requirement was waived.

Brantley Management contends the amendment it requested and drafted is unenforceable because it was not supported by consideration. They point to Saltz's

testimony "that when the Note purportedly was amended in 2006, Mr. Saltz did not give BMC anything monetary or otherwise." In fact, Saltz "suffered no legal detriment, but sought to improve his position . . . ." If there is consideration, however, Brantley Management contends it is past consideration, and "past consideration is no consideration at all."

Thus, without consideration, not even three years of performing can ratify the amendment because it was void under Ohio law. Nor does the antecedent debt exception to consideration apply because: the amendment did not release Brantley Capital; the amendment did not mention forbearance against Brantley Capital; and the amendment is not a negotiable instrument. Alternatively, Defendants contend the absence of Brantley Capital's signature invalidates the amendment. What remains then, is the note, which is enforceable against Brantley Capital and its approximately $300 in assets.

III.

A. Pinkas's Motion to Dismiss

When, as here, discovery is complete, "the plaintiff must allege specific facts supporting its position" the non-resident defendant is subject to the court's

personal jurisdiction.[2] In Delaware, the courts first look at whether there is jurisdiction under Delaware's Long-Arm Statute. The statute "is to be broadly construed to confer jurisdiction to the maximum extent possible under the Due Process Clause."[3]

Personal jurisdiction under the statute is either specific or general. Specific jurisdiction turns on the nexus between the non-resident defendant's Delaware contact and the cause of action.[4] General jurisdiction provides the court with jurisdiction over a non-resident defendant regardless of whether there is a nexus between the claim and the defendant's Delaware contacts.[5] General jurisdiction is based on a persistent course of conduct through which the non-resident defendant creates a general presence in Delaware.[6]

If there is a statutory basis for personal jurisdiction, the next question is whether exercising personal jurisdiction comports with traditional notions of justice

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[2] *See e.g., Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409 (Del. Ch. July 14, 2008) (PARSONS, V.C.).

[3] *Hercules Inc. v. Leu Trust & Banking (Bah.)*, 611 A.2d 476, 480 (Del.1992).

[4] *See LaNuova D & B, S.p.A. v. Bowe, Co. Inc.*, 513 A.2d 764 (Del. 1986).

[5] *Id.*

[6] *Id.*

and fair play under the 14th Amendment's Due Process Clause.[7] That requires the non-resident defendant to have minimum contacts with Delaware such that he could have reasonably anticipated being haled into a court here.[8] The constitutional question comes down to whether the non-resident defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[9]

The difficulty here is Saltz uses information Pinkas submitted in a pending Chancery case to show that the court has general jurisdiction. Pinkas, however, does not deny Saltz's claims, only that "Plaintiff has not developed any factual record that can support a finding of general jurisdiction over Mr. Pinkas."

So, for jurisdictional purposes, Pinkas does not dispute that he has formed at least 22 companies in Delaware since 1987. Further, it is undisputed that he serves on the boards of two of them, and he has been using those companies to manage his other Delaware companies' investments and generate fees. That is a persistent course of conduct that is enough to subject Pinkas to the court's general, personal jurisdiction.

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[7] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus. Inc.*, 871 A.2d 428 (Del. 2005).

[8] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

[9] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (U.S. 1985) *citing Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Pinkas's contacts with Delaware are such that, even without physically setting foot in Delaware, he should have anticipated the possibility that he would have to litigate in a Delaware court. Notwithstanding considerations of general and specific jurisdiction, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum."[10] Pinkas points to his overwhelming contacts with Ohio, but they are not a counterweight to his repeated contacts with Delaware. After forming companies in Delaware for decades, which includes making payments to the State and availing himself of its law and protections, Pinkas could have reasonably anticipated litigating here.

B. Pinkas's Motion for Summary Judgment

A motion for summary judgment will be granted when no genuine dispute of material fact exists and the movant is entitled to judgment.[11] It is the movant's burden to show that no genuine dispute exists.[12] If met, that burden shifts to the non-movant to show material issues of fact.[13] The facts are construed in the non-movant's favor.[14]

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[10] *Burger King*, 471 U.S. at 474 *citing Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

[11] Super. Ct. Civ. R. 56(c).

[12] *Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

[13] *Id.*

[14] *AeroGlobal*, 871 A.2d at 444.

Until now, Saltz has not tried to hold Pinkas liable for the money Saltz loaned Pinkas's company. The best evidence, the only evidence, Saltz has is Pinkas's comment "I can do that" made during a business discussion. For purposes of this motion, the court must accept that Pinkas said that. Pinkas's comment does not, however, as a matter of law, make him personally liable for the $1 million. No reasonable juror could conclude such an isolated comment created a contract or guaranteed the loan.[15] Saltz has produced no documents backing up Pinkas's statement other than an e-mail from Brantley Management to its outside auditors correcting their misunderstanding that Pinkas guaranteed Saltz's loan. Incidentally, Saltz's alternative argument that Pinkas must answer for Brantley Management's breach, is incorrect. Piercing the corporate veil as Saltz wants, "is an argument which can be considered only in Chancery; the Superior Court ha[s] no power to pass upon [that] contention."[16]

No Ohio court has ruled that money can be converted. Typically, conversion applies to tangible goods. Ohio courts, however, have held that intangible

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[15] *See e.g.,SDI/Columbus Equities, L.P. v. Scranton*, 1993 WL 271003 at *2 (Ohio Ct. App. 10 Dist. 1993) (YOUNG, J.) *citing Sturges v. Bank of Circleville*, 11 Ohio St. 153 (Ohio 1860).

[16] *Sonne v. Sacks*, 314 A.2d 194, 197 (Del. 1973).

assets such as partnership interests and intellectual property can be converted in some circumstances. Saltz's money, however, is not the sort of intangible asset an Ohio court would find convertible. All that is disputed here is money. When Saltz loaned the money he had no demonstrated expectation the same bills would be returned when the note matured.

C. Brantley Management and Saltz's Cross-Motion for Summary Judgment

Brantley Management and Saltz cross-move for summary judgment on the enforceability of the amended note. On cross-motions for summary judgment, the parties implicitly concede that no factual dispute exists, leaving the court to decide the legal issue.[17] The issue is whether the amended note is enforceable under Ohio's antecedent debt exception, or whether Saltz's forbearance is a legal detriment that makes the amended note enforceable. If it is, the next issue is whether the original borrower had signed the amendment making Brantley Capital the borrower. In the background is Brantley Management's conduct since signing the amendment: over three years it paid almost $400,000 in interest, then tried to renegotiate after it defaulted. That performance is at odds with Brantley Management's *ad hoc* defenses against enforceability.

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[17] Super. Ct. Civ. R. 56(h).

Forbearance of a legal right is consideration that makes a promise enforceable. Under Ohio law, consideration "may consist of a benefit to the promisor or a detriment to the promisee."[18] A legal detriment is the forbearance of doing a legal right.[19] As Saltz puts it, when he signed the amendment Brantley Management asked for, he "suffered a detriment in not seeking immediate payment from [Brantley Capital]." Irrespective of whether Brantley Capital had defaulted, Saltz agreed to release Brantley Capital and turn to Brantley Management in case of default. In fact, that is what happened here: Saltz turned to Brantley Management, not Brantley Capital, when the amended note defaulted. Brantley Management had paid under the amended note for at least three years, which was the majority of the note's life. Further, as mentioned, when Defendants proposed the amendment, Brantley Management's CFO explained to Saltz that it was meant to formalize the reality that Brantley Management had been paying the note. So, the amended note is enforceable against Brantley Management even if it received nothing when Saltz signed the amendment. Again, Saltz suffered a detriment by forbearing from suing Brantley Capital to amend the note at Brantley Management's request so it would "reflect the reality of the arrangement" between the two companies.

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[18] *Sur-Gro Plant Food Co., Inc. v. Morgan*, 504 N.E.2d 445, 450 (Ohio Ct. App. 12 Dist. 1985).

[19] *Id.*

Saltz's forbearance is not past consideration as Brantley Management argues. Conceptually, past consideration is no consideration when the original parties modify a contract but do not exchange new consideration to support the modification.[20] Here, Brantley Management owed no obligation under the note; its obligation arose when it signed the amendment and the amended note reflects the consideration that was new to Defendants.

The antecedent debt exception provides a similar, but alternative reason to enforce the amended note against Defendants. Under Ohio law, a negotiable instrument is issued for value, i.e., consideration, when it "is issued . . . as security for an antecedent claim against any person, whether or not the claim is due."[21] It is unrefuted the original note is a negotiable instrument under Ohio law. Under Ohio Rev. Code Ann. § 1303.03(A) a negotiable instrument must contain:

1. An unconditional promise or order to pay a fixed amount;
2. Payable to bearer or to order at the time it is issued;
3. Payable on demand or at a definite time; and
4. It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.

Defendants' argument the antecedent debt exception does not apply

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[20] *See e.g., Carlisle v. T&R Excavating, Inc.*, 704 N.E.2d 39 (Ohio Ct. App. 9 Dist. 1997).

[21] Ohio Rev. Code. Ann. § 1303.33(a)(3) (WEST 1994).

because the amendment is not a negotiable instrument is artificial. Whether the amendment explicitly released Brantley Capital or mentioned forbearance is less important than the fact that all parties have behaved that way. As discussed, Brantley Capital has not made an interest payment under the note since it was amended in 2006. So, it seems that Brantley Capital and its Managing Member, Pinkas, believed the amendment released Brantley Capital. On top of that, Pinkas's other company, Brantley Management paid the interest without once challenging the amendment's validity.

Finally, Defendants' contention that the amendment is not a negotiable instrument under Ohio law rests on the distinction Defendants' have created just for purposes of this litigation. The amendment incorporated the note by the clause providing the note's other terms remained unchanged. Thus, the amended note is a negotiable instrument, issued for value, or, as Saltz puts it, "BCM owed Mr. Saltz under the Promissory Note. In July 2006, Defendant BMC executed the Amendment, taking over BCM's antecedent debt to Mr. Saltz." That can serve as no surprise to Brantley Management considering its CEO, Pinkas, signed the note and the amendment, albeit in different outfits.

The last hurdle to enforcing the amended note against Brantley

Management is whether Brantley Capital's failure to sign the amendment was failure of a condition precedent. Under Ohio law, a condition precedent is an event that must occur, such as obtaining financing or selling real property, before a duty of immediate performance of a promise arises."[22] Waiver of a condition precedent requires the party asserting the waiver, Saltz, to "prove a clear, unequivocal, decisive act of the party against whom the waiver is asserted (Defendants), showing such a purpose or acts amounting to an estoppel on [Defendants] part."[23] Brantley Capital's ongoing, three-year silence about the changed borrower and its lack of any payment of the interest works as a waiver of that condition. If that is not enough, the clause protected the original parties from unilateral changes that would burden them with new obligations. If anything, the amendment benefitted Brantley Capital, whose managing member, Pinkas, could point to it as proof Brantley Management agreed to pay the interest and principal. To hold otherwise would let Pinkas play both sides off one another.

IV.

For the foregoing reasons, Defendant Pinkas's motion to dismiss for lack of personal jurisdiction is **DENIED** and Defendant Pinkas's motion for summary

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[22] *Cornett v. Fryman*, 1992 WL 12611 at * 2 (Ohio Ct. App. 12 Dist. Jan. 27, 1992).

[23] *Id. citing White Co. v. Canton Transp. Co.*, 2 N.E.2d 501, 505 (Ohio 1936).

judgment is **GRANTED**. Plaintiff Saltz's motion for summary judgment as to Defendant Brantley Management is **GRANTED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary
Michael J. Barrie, Esquire
Joseph J. Bellew, Esquire